

H.5469 Balances Public and Private Rights Along Rhode Island's Shore

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In 1976, I had just been admitted to the Rhode Island Bar but found it remarkable how difficult it was to gain admission to Rhode Island's beautiful shore. I researched and wrote my first article on the subject, "Public Access to the Shore: the Rhode Island Example" in the *Coastal Zone Management Journal* later that year. I reviewed all of the prior Supreme Court case law in Rhode Island regarding shore boundaries, and learned that the General Assembly became directly involved in 1957 when they formed a commission to discover public rights-of-way to the shore. The plan was to start in Westerly and move eastward, town by town. They never got out of Westerly. The problem then, as it is today, is very simple: coastal property is expensive because many would like to live along the shore, and yet many property owners do not realize that the public at large will become their neighbor at the seaward property boundary of mean high water. That dynamic tension is what this bill is designed to address.

In 1982, the Rhode Island Supreme Court was asked to address the issue of determining the boundary between public and private rights in *State v. Ibbison*. In that case, six fishermen engaged in a beach cleanup were arrested and charged with criminal trespass after Wilfred Kay, a coastal property owner, had staked out what he believed was the mean-high-water boundary. The fishermen went above the stakes to the most recent tideline and were promptly charged with criminal trespass by a Westerly patrolman. This case is mostly remembered for the fact that the Rhode Island Supreme Court made it clear that they wished to conform with the federal precedent set in 1935, in *U.S. v. Borax*, establishing the boundary between public and private rights as "MHW" or mean high water. Although that boundary can be determined on a day-to-day basis, it's not simple, requires surveying expertise, and determining what the daily high tides have been for the last 18.6 years – the diurnal lunar cycle. And although the rocky Jamestown shore is mostly stable, the ocean-facing communities of Westerly, Charlestown, South Kingstown, Narragansett and New Shoreham have sandy beach shorefronts that migrate in and out with the seasons and are subject to significant erosion from storm events. It makes determining the boundary every year during beach season very problematic, with high profile arrests occurring almost annually – and yet no trespass convictions, to my knowledge, have ever been upheld. The reason why is the part of the *Ibbison* case property rights advocates don't like to talk about: the six defendants had their trespass charges dismissed because, as the court held, "basic due process provides that no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed." The court goes on to place a nearly impossible burden on coastal communities: "In the future, any municipality that intends to impose criminal penalties for trespass on waterfront property above the mean-high-tide line must prove beyond a reasonable doubt that the defendant knew the location of the boundary and intentionally trespassed across it."

In 1986, Rhode Island convened a Constitutional Convention to address a wide range of issues affecting Rhode Island governance. Of the dozen or so topics that eventually were selected,

adopted, and sent to the voters for approval, a better definition of what the public's rights were along the shore was ultimately the provision that received the highest plurality of votes from the voters for approval. The *Ibbison* decision was very fresh in the minds of the Constitution's delegates. Delegate George Sisson, the owner of Westerly Cablevision at the time, was charged with chairing the committee on the rights to the shore. I was the only academic and attorney who had written on shore rights from the public's perspective and Delegate Sisson asked me to help research and develop his committee's report. At the outset of our work, Convention President Kevin McKenna made it clear that he wanted to see a dramatic expansion of public rights to the shore. I took a much more cautionary approach, aware that going too far would certainly result in a violation of the Fifth Amendment to the U.S. Constitution – "No property shall be taken without just compensation." In the end, we settled on a conservative approach, listing the four rights along the shore that had previously been upheld by the Rhode Island Supreme Court: passage along the shore, entering and leaving the water for bathing, fishing, and gathering up to one cartful of seaweed per day. Although it was not as far-reaching as many had hoped, enshrining those rights in Article 1, Section 17 of the Constitution meant that no subsequent court decision could overturn those previously defined rights.

But where does that leave us today? A strong set of public rights in the Constitution, an agreement that MHW represents the boundary between public and private rights, but the knowledge that no court has found criminal intent to trespass? The answer is contained in this bill – it would simply decriminalize trespass along a clearly recognizable feature along the shore. It does not affect private property rights – a property owner is still free to go through the complexity of boundary delimitation and file a civil suit if someone willfully crosses the MHW line. But because of the complexities noted in the *Ibbison* case, and the subsequent lack of criminal convictions for trespass along the shore, this bill "threads the needle" and provides a fair balance between public and private rights. It gives the public guidance on how to proceed without affecting the property rights of shorefront owners.

If the fear is that members of the public will somehow expose property owners to liability, the General Assembly solved that problem years ago when it passed G.L.R.I. 32-6-1, the Rhode Island Recreational Use Statute. That would protect against claims that slippery seaweed caused a fall. The purpose of the law is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability to persons entering thereon for public purposes." Under 32-6-5 (b) CRMC rights of way automatically have "limited liability" and the positive effect of this law should reassure coastal property owners as well.

The floodgates are not going to open, the end of the world and property rights as we know them are not about to end, and we can do better for the citizens of Rhode Island who want to follow the law and still exercise their traditional "privileges of the shore."

Thank you for the opportunity to address this very important issue before you.